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Supreme Court, U.S.
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No. 04-570

In The

Supreme Court of the United States

MARY MARTIN,

Petitioner,

v.

BOYD GAMING CORPORATION d/b/a
M/V TREASURE CHEST CASINO
and TREASURE CHEST CASINO, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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QUESTION PRESENTED

1. In *Stewart v. Dutra Construction Co.*, 543 U.S. ___, 2005 WL 405475 (February 22, 2005), this Court recently clarified the definition of a "vessel" for purposes of the LHWCA and the seaman status test, and overruled the "primary purpose" test first articulated in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992). This Court overruled *DiGiovanni, supra*, because it improperly required that a vessel be primarily used for navigation, or if primarily used for construction, be in actual transit at the time of the injury. This Court found that the "primary purpose" approach was inconsistent with the text of 1 U.S.C. Section 3 or the established meaning of the term "vessel" under the general maritime law. *Stewart* at ___. In the present case, the Fifth Circuit used the same approach taken by the Court in *DiGiovanni, supra*, and therefore should be reversed. The question remains whether the M/V TREASURE CHEST CASINO is "practically capable" of transportation such that it satisfies the definition of "vessel" under 1 U.S.C. Section 3 and this Court's holding in *Stewart v. Dutra*.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption of the case.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana granting defendants' motion for summary judgment is reported at 252 F.Supp.2d 321. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 374 F.3d 375. The unreported order by the United States Court of Appeals for the Fifth Circuit denying a petition for rehearing is reprinted in Petitioner's Petition For A Writ Of Certiorari as Appendix 12. The Order denying Petitioner's Writ of Certiorari is reported at 2005 U.S. LEXIS 2089.

JURISDICTION

The United States District Court for the Eastern District of Louisiana had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1333, as plaintiff claimed seaman's remedies under the Jones Act, 46 U.S.C. § 688, and the general maritime law. The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and Rule 4(a)(2) of the Federal Rules of Appellate Procedure, as well as 28 U.S.C. § 1292(a)(3), as the district court issued final, appealable judgments, dismissing plaintiff's Jones Act and general maritime law claims. The Fifth Circuit Court of Appeals issued the opinion below on July 8, 2004. The Fifth Circuit Court of Appeals denied a request for rehearing on August 6, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 44.

STATUTORY PROVISIONS INVOLVED

Section 3 of the Rules of Construction Act provides in relevant part:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3.

The Jones Act, 46 U.S.C. § 688(a), provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

Section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905, provides in relevant part:

> (b) Negligence of vessel –
>
> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel. . . .

33 U.S.C. § 905(b).

STATEMENT OF THE CASE

Martin sought relief under the Jones Act and the general maritime law for injuries that she sustained arising out of the negligence of the captain and navigational crew of the M/V TREASURE CHEST CASINO. Alternatively, Martin sought relief under the general maritime law for vessel negligence. For a more complete recitation of the facts of this case, Martin respectfully directs this Court to her Petition For A Writ Of Certiorari.

In response to Martin's Jones Act claim, the Fifth Circuit held that, because the **transportation function** of the M/V TREASURE CHEST CASINO was no longer its **primary function**, it was not a vessel for purposes of the Jones Act. *Martin v. Boyd Gaming*, 374 F.3d 375 (5th Cir. 2004). In response to Martin's general maritime law claim, the Fifth Circuit held, in a footnote, that " . . . because the TREASURE CHEST is not a vessel "in navigation" under the Jones Act it is likewise not a vessel under the general maritime law foreclosing either a general maritime law claim or a Section 905(b) claim." *Martin, supra*, at fn 1. Both of the Fifth Circuit's holdings are in direct conflict with this Court's recent holding and historical analysis in *Stewart v. Dutra Construction Co.*, 543 U.S. ___, 2005 WL 405475 (February 22, 2005).

REASONS FOR ALLOWANCE OF THE PETITION FOR REHEARING

In *Stewart*, this Court recently clarified the definition of a "vessel" for purposes of the LHWCA and the seaman status test, and overruled the "primary purpose" test first articulated in *DiGiovanni v. Traylor Brothers, Inc.*, 959

F.2d 1119 (1st Cir. 1992).[1] This Court overruled *DiGiovanni, supra*, because it improperly required that a vessel be primarily used for navigation, or if primarily used for construction, be in actual transit at the time of the injury. This Court found that the "primary purpose" approach was inconsistent with the text of 1 U.S.C. Section 3 or the established meaning of the term "vessel" under the general maritime law. *Stewart* at ___. The approach taken by the Fifth Circuit in the present case was the same approach taken by the Court in *DiGiovanni, supra*, and therefore should be reversed.

In *Stewart*, this Court held:

> **Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose.** (Quotations and italics in original, emphasis supplied).
>
> **Under Section 3, a "vessel" is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment.** (Quotations in original, emphasis supplied).
>
> **... The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one. In some**

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[1] *DiGiovanni* relied upon the same Fifth Circuit cases, *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989) and *Gremillion v. Gulf Coast Catering, Inc.*, 904 F.2d 290 (5th Cir. 1990), as did the district and appellate courts in the present case. *See DiGiovanni, supra*, 959 F.2d at 1123.

> **cases that inquiry may involve factual issues for the jury.** (Quotations in original, emphasis supplied).

Stewart at ___.

In direct conflict with *Stewart* and 1 U.S.C. Section 3, the Fifth Circuit required that the M/V TREASURE CHEST CASINO's **primary function be transportation** over navigable waters **at the time of Martin's injury** to satisfy Jones Act vessel status. Since the Fifth Circuit found that the transportation function was no longer an important part of the business in which the vessel was engaged, the Court found that the M/V TREASURE CHEST CASINO simply was no longer a vessel for Jones Act purposes. Then, totally ignoring 1 U.S.C. Section 3, the Fifth Circuit held that, because not a vessel for Jones Act purposes, the M/V TREASURE CHEST CASINO was not a vessel under the general maritime law. This approach was flatly rejected by this Court in *Stewart* and now presents a conflict between the Fifth Circuit and this Court.

In *Stewart*, this Court referred to the floating work platform in *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995) as an example of a watercraft that was permanently removed from navigation and Martin fully agrees with the Court's analysis in that regard.[2] In *Pavone*, a barge that was originally constructed to be a floating work platform was secured to shore by

[2] The *Pavone* Court relied upon the same two cases as did the Court in *DiGiovanni*, namely *Ducrepont* and *Gremillion*, *supra*. Since this Court expressly overruled *DiGiovanni*, it now appears that, while the result reached in *Pavone* may be correct, the approach taken by the Fifth Circuit is suspect.

lines tied to sunken steel pylons, rendering it practically incapable of transportation or movement. However, the M/V TREASURE CHEST CASINO is vastly different from the permanently moored barge in *Pavone*.

The "continuously" moored status that the M/V TREASURE CHEST CASINO enjoys from the United States Coast Guard is on paper only, meaning that it remains "continuously" moored, as opposed to "permanently" moored, only while gambling patrons are onboard. On the other hand, it remains a fully operational passenger vessel and, in fact, still conducts periodic voyages. Its use as a means of transportation on water is certainly more than a "practical possibility" or theoretical one. It is a reality. Like the SUPER SCOOP in *Stewart*, the M/V TREASURE CHEST CASINO has not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport. Consequently, if the Fifth Circuit's opinion is allowed to stand, the captain and crew of the M/V TREASURE CHEST CASINO will continue to move in and out of Jones Act and general maritime law coverage depending upon when gambling patrons are onboard. That does not appear to be the intent of Congress or this Court. Moreover, if the Fifth Circuit's opinion is allowed to stand, there will exist a lack of uniformity between the Fifth Circuit and this Court.

"Applying Section 3 brings within the purview of the Jones Act the sorts of watercraft considered vessels at the time Congress passed the Act." *Stewart* at ___. Certainly, traditional, paddle-wheel driven riverboats like the M/V TREASURE CHEST CASINO were considered vessels at the time the Jones Act was passed. At the very least, whether the M/V TREASURE CHEST CASINO's use as a

means of transportation on water is a "practical possibility" should be a factual issue for the jury. *Stewart* at ___.

CONCLUSION

The Fifth Circuit focused too narrowly on the M/V TREASURE CHEST CASINO's transportation function at the time of Martin's injury as being the decisive factor in determining vessel status. This approach was flatly rejected by this Court in *Stewart v. Dutra, supra*. The M/V TREASURE CHEST CASINO remains a fully operational, passenger vessel on navigable waters which, in fact, makes periodic voyages. Whether its use as a means of transportation on water is a "practical possibility" should be a factual issue for the jury.

Considering the foregoing, Martin respectfully requests that this Petition for Rehearing on Writ of Certiorari be granted, the Fifth Circuit's opinion be reversed and this matter be remanded to the district court for further proceedings consistent with this Court's decision in *Stewart v. Dutra, supra*.

Respectfully submitted,

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SUPREME COURT RULE 44 CERTIFICATE

Undersigned counsel hereby certifies to this Honorable Court that the reasons for seeking this Petition for Rehearing are limited to intervening circumstances of a substantial and controlling effect and which have not been previously presented and that this Petition is being presented in good faith and not for delay.

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